85-713

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

GUSTAV E. BEERLY, TRUSTEE OF THE
GUSTAV E. BEERLY TRUST

Petitioner,

vs.

DEPARTMENT OF THE TREASURY, DONALD REGAN, SECRETARY COMPTROLLER OF THE CURRENCY; THE MID-CITY NATIONAL BANK OF CHICAGO; AND MID-CITCO, INC., CHARTERED BANK HOLDING COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether in this case of first impression, the Comptroller of the Currency and the Court of Appeals erred by sanctioning an approach to determining "value" under 12 U.S.C. §215a which distinguishes between minority and majority shareholders.

2. Whether, under the meaning and intent of §215a, a dissenting shareholder is entitled to receive a value which reflects his pro-rata share of the corporation regardless of his or her status as a minority or majority shareholder.

3. Whether adjusted book value and investment value properly reflect a dissenting shareholders pro-rata share of a national bank or whether liquidation value is the only true indicator of "value" under §215a.

4. Whether 12 U.S.C. §215a is unconstitutionally vague and violates the fifth amendment of the United States Constitution as it fails to provide for adequate compensation in the form of interest or dividends during the valuation process.

5. Whether 12 U.S.C. §215a is unconstitutional as it fails to provide the procedural safeguard of a hearing prior to a determination by the Comptroller of the compensation a dissenter is to receive as a result of the tender of his or her shares.

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28 U.S.C. §215a — Provisions in pertinent part provide "any shareholder of any association or State bank to be merged into the receiving association who has voted against such merger at the meeting of the association or bank of which he is a stockholder, or has given notice in writing at or prior to such meeting to the presiding officer that he dissents from the plan of merger, shall be entitled to receive the value of the share so held by him . . . . . ." i, iii, 2-3, 5-10, 13

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IN THE

Supreme Court of The United States

OCTOBER TERM, 1985

GUSTAV E. BEERLY, TRUSTEE OF THE GUSTAV E. BEERLY TRUST,

Petitioner

vs.

DEPARTMENT OF THE TREASURY, DONALD REGAN, SECRETARY COMPTROLLER OF THE CURRENCY; THE MID-CITY NATIONAL BANK OF CHICAGO AND MID-CITCO, INC., A CHARTERED BANK HOLDING COMPANY,

Respondents.

PETITIÓN FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, GUSTAV E. BEERLY, TRUSTEE of the GUSTAV E. BEERLY TRUST, hereby respectfully requests that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Seventh Circuit entered on July 29, 1985, and upon which petition for rehearing was denied on August 30, 1985.

OPINIONS BELOW

The judgment and opinion of the Court of Appeals for the Seventh Circuit No. 84-1763, affirming the District Court's decision appears as Appendix A. The order of the Appellate Court denying the Petition for Rehearing appears as Appendix B. The order of the Appellate Court denying Petitioner's motion to recall and stay the mandate appears as Appendix C.

The memorandum opinion of the District Court for the Northern District of Illinois, Eastern Division, No. 83 C 4417, granting Respondent's Motion for summary judgment and

denying Petitioner's motion for summary judgment appears as Appendix D.

The decision of the Comptroller of the Currency appraising the stock of the Mid-City National Bank of Chicago appears as Appendix E.

JURISDICTION

The Petitioner, Gustav E. Beerly, Trustee of the Gustav E. Beerly Trust (hereinafter called "Beerly") pursuant to 28 U.S.C. §701-706 filed an action in the Northern District of Illinois Eastern Division for judicial review of a final administrative decision of the Respondent, Comptroller of the Currency (hereinafter called "Comptroller") a Federal Administrative Agency which operates under the authority of the Respondent, Department of the Treasury. The District Court, granted summary judgment for the Respondents on April 12, 1984.

Beerly pursuant to 28 U.S.C. §1291 then appealed to the Seventh Circuit Court of Appeals. On July 29, 1985, the Appellate Court affirmed the District Court's decision. Beerly then filed a Petition for Rehearing which was denied on August 30, 1985.

This Petition for Certiorari was filed within ninety (90) days of the Appellate Court's decision denying Beerly's Petition for Rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

12 U.S.C. §701-706; 28 U.S.C. §1291; 12 U.S.C., §215a; 28 U.S.C. §1254 (1) and the Fifth Amendment to United States Constitution are set forth as Appendix F.

STATEMENT OF THE CASE

The Petitioner, GUSTAV E. BEERLY is a minority shareholder of the Mid-City National Bank. After the majority voted to merge, Beerly dissented and demanded *the value* of his shares.[1]

The rights of dissenting shareholders and the means of determining the value of their shares is set forth in 12 U.S.C. §215a. Pursuant to that statute, both Beerly and the Bank selected appraisers. The Bank refused to follow the statutory procedure of §215a and refused to name a third appraiser. Beerly was then forced to apply to the Comptroller of the Currency for a determination of value.[2]

While the Comptroller invited written submissions from the parties, the Comptroller then proceeded to dismiss the submissions, claiming that the evidence was not relevant as it dealt with the transfer of controlling interests of bank stock and was not applicable to the determination of the value of Beerly's minority interest. Beerly's appraiser determined that the shares of Mid-City's stock was worth $1,532,909.97, while the Comptroller set the value at $582,009.79. The Comptroller set value of Beerly's stock at $282.39 per share, and Beerly's appraised value was $743.77 per share.

The Comptroller utilized two methods and dismissed two others. While rejecting market value and book value, the Comptroller employed adjusted book value and investment value.[3]

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1. Beerly owns 2061 shares of the Bank, a 3% interest.

2. Resort to the Comptroller is a final step which was forced by the Bank's refusal to cooperate in the statutory process and select a third appraiser.

3. Throughout these proceedings Beerly has argued that it is improper to consider his status as a minority shareholder of what he is selling. Employing the adjusted book value method violates both points as market value is a component of the adjusted book value equation. When it is available, market value for banks like Mid-City reflects isolated trades of minority shares.

Dissatisfied with the approach and the subsequently flawed result, Beerly filed suit in Federal District Court in the Northern District of Illinois for judicial review of the Comptroller's finding. Beerly argued that not only was the result unreasonable, but the approach was unlawful, and the statute was unconstitutional first because the Comptroller failed to protect Beerly's right to interest through the lengthy administrative process, and second because it allowed the Comptroller to resolve important property issues without an evidentiary hearing.

The District Court and the Court of Appeals for the Seventh Circuit sanctioned the Comptroller's finding, both holding that since the Comptroller followed conventional methods of valuation, it was reasonable even though a distinction was made by the Comptroller between the value of majority and minority shares of a dissenter.

REASONS FOR GRANTING THE WRIT

I. IN THIS CASE OF FIRST IMPRESSION, THE VALUATION METHODS CURRENTLY EMPLOYED BY THE COMPTROLLER OF THE CURRENCY VIOLATE THE INTENT AND MEANING OF 12 U.S.C. §215a.

This case is one of first impression and raises an issue of extreme importance.[4] The Comptroller records show that from 1918 when Section 215a was enacted to 1975 there were 1580 mergers and consolidations of national banks, an average of approximatley 28 per year. From 1975 to June, 1985 there were 971 mergers and consolidations of national banks for an average of approximately 92 per year. The yearly average was increased by three hundred per cent in the last ten (10) years.

The questions raised by this appeal are timely and go to the heart of the rights of dissenters in this age of ever spiralling numbers of mergers.

The first issue is whether, in view of the clear legislative intent behind §215a, the Comptroller failed to employ a method of valuation which protects dissenting shareholders. The second is whether the Comptroller utilized and the Courts approved a methodology which disadvantages dissenters. The third and fourth issues are related and inquire whether §215a is constitutionally sound in light of the statutes' failure to require an evidentiary hearing and to provide for the payment of interest during the long process.

The role of this Court is central as guidance is required not only on the proper methodology but also on the constitutional muster of the statute itself.

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4. Judge Posner, writing for the Seventh Circuit was surprised by the fact that only one district case has been reported. *Simonds* vs. *Guaranty Bank & Trust Co.*, 492 F. Supp. 1079 (D. Mass. 1979).

A. The Legislative History of 12 U.S.C. §215a Directs The Comptroller To Use A Method Which Facilitates Mergers And Consolidations Of National Banks As Well As Protects The Interests Of Dissenting Shareholders.

In deliberating over the relative merits of §215a, Congress announced the two-fold purpose of the statute. Congress wanted to simplify the merger and consolidation procedures and at the same time protect the interests of dissenting shareholders.

In order to fully appreciate the intended operation of §215a, it is necessary to consider the common law which prompted the Congressional enactment of this statute. At common law, a merger required unanimous consent and a single shareholder could prevent a merger or consolidation. *Voeller* v. *Neilston Warehouse Co.*, 311 U.S. 531, 61 S. Ct. 376, 377, 378, Note 6, (1941); *Chicago Corp.* vs. *Munds*, (Delaware) 172 A. 452, 454 (1934). As the Seventh Circuit correctly observed after citing *Chicago Corporation*, a single dissenting shareholder "could veto the transaction." It is against this historical background that §215a must be construed.

While the merger procedures were established, the rights of dissenters were to be expressly protected. The House Reports noted that proper provision is made by the proposed law to protect any dissenting shareholder in either corporation who does not desire to be connected with the consolidated bank. H. Rep. 408, accompanying H.R. 10205, March 25, 1918. The Senate notes reflect identical concerns. It states that §215a "provides a means of paying in full any dissatisfied stockholder by arbitration." S. Rep. 406, April 24, 1918.

Sometime in the sixty-five years since the passage of §215a the protective measures intended by congress were abandoned by the Comptroller and now even the Seventh Circuit has misinterpreted the important two-fold purpose. The Seventh Circuit's statement that all shareholders may be better off with a rule that facilitates takeovers, even though

some[5] may get lower prices for their shares if a takeover occurs ignores the clear intent of Congress and amounts to an attempt to rewrite legislative intent.

B. Any Valuation Method Which Considers The Dissenters Status As A Minority Shareholder Will Result In A Determination Of Value Which Fails to Adequately Compensate Him.

It naturally follows that Comptroller procedures which operate to disadvantage dissenting shareholders violate the intent of §215a. Beerly contends that the valuation methods utilized by the Comptroller do precisely that. In its appraisal and in its briefs, the Comptroller emphasized what Beerly was and was not selling. In fact, sales history, market power and minority or majority status have no place in §215a bank stock valuations. In one of its briefs, the Comptroller wrote:

> The Comptroller, in its discretion, has properly made a well supported decision that unadjusted book value is not an appropriate valuation and that premiums over book value are not appropriate considerations due to the fact that a controlling interest is not involved.[6]

The question is begged as to what the Comptroller would do if a larger interest was involved. Beerly asserts that it makes no difference and that a dissenter should receive his or her aliquot share of the corporation.

C. "Value" in 12 U.S.C. §215a Must Mean A Pro Rata Share Of The Bank.

The Seventh Circuit erred by not recognizing the intrinsic unfairness of the valuation methods employed by the Comptroller.[7] In order to determine a method consistent with

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5. Dissenting Shareholders

6. Brief of the Comptroller before the Seventh Circuit, p. 11.

7. For example, the Seventh Circuit recognized that Adjusted Book Value is book value multiplied by the ratio of market prices of comparable institutions to their book value. Market Value considers factors which do represent the value of the dissenter's proportionate share.

the intent of §215a, legal history is again our best guide. In *Chicago Corp.* v. *Munds,* (Delaware) 172 A. 452, 455 (1934) the court said that a dissenter should receive the "value of his stock" which is a "proportional share of an active enterprise which but for the compulsion of others he could continue to be associated with in the indefinite future." Id. at 455. Indeed, prior to the enactment of §215a, a dissenter could force the dissolution and liquidation of a national bank. Under a liquidation method of valuation, each shareholder receives his or her proportionate share of the corporation which is fair and consistent with the intent of §215a.

D. Liquidation Value Is The Only Valuation Method Which Would Consistently Result In A Value, Which Reflects The Dissenter's Pro Rata Share Of The National Selling Bank.

Liquidation value is the only proper method of valuating bank stock in a merger situation. This court long ago recognized that majority-voted mergers invite the victimization of the minority, and the intent of §215a is to protect a dissenter by allowing him to recover the value of his shares. *Voeller* vs. *Neilson Warehouse Co.,* 311 U.S. 531, 61 S.Ct. 376, 377, 378, Note 6 (1941).

The only method of valuation which provides liquidation value, a proportionate share determination, was ignored by the Comptroller and the Courts. The Seventh Circuit believed that the Comptroller used conventional approaches to valuation and, therefore, the results should be protected from judicial invalidation.[8] On the contrary the approaches employed by Comptroller should be invalidated because they invite a victimization of dissenters. *American General Corp.* vs. *Camp,* 171 Md. 629, 190 A. 225 (1937). In that case the Maryland court said at page 228:

> The owner of shares of stock in a corporation whose legal existence is at an end would be entitled to receive the aliquot proportion which the number of

8. Appellate Court decision, page 5.

> shares held would be entitled to receive in the distribution of the net amount of the corporate funds in which his particular kind of stock would be entitled to share. Thus, by an ascertainment of all the assets and liabilities of the corporation, the intrinsic value of the stock, and not merely its market value, when traded in by the public, would be determined. If the dissenting owner receive this amount, so ascertained, he would receive the fair value of his stock.

In *F.W. Woodward* vs. *Quigley* (Iowa) 133 N.W.2d 38 (1965), the Iowa Supreme Court noted that the Court's real "object (under appraisal statutes) is to ascertain actual worth of that which dissenter loses because of his unwillingness to go along with controlling stockholders . . . " Id. at 41.

In light of the objective of §215(a) any valuation which does not give the minority their proportionate share violates the intent of Congress.

II. BY FAILING TO PROVIDE FOR THE PAYMENT OF INTEREST DURING THE VALUATION PROCESS, 12 U.S.C. §215a IS UNCONSTITUTIONAL IN ALLOWING THE TAKING OF PROPERTY WITHOUT PROPER COMPENSATION, AND THE COURT FURTHER ERRED BY NOT CONSIDERING THIS ISSUE.

The absence of any provision for interest in §215a is a glaring example of how a dissenting shareholder is hurt and why the Act is unconstitutional. Since February 17, 1982, Beerly received no interest or dividends. The Seventh Circuit calculated the loss of interest at $65,000.00 which constitutes an unreasonable deprivation of property. The Act makes no provision for dividends or interest for the dissenting shareholders, and provides no procedural safeguards for them. Dissenting shareholders are entirely at the the mercy of the whims of the Comptroller.

Beerly's appraisal exceeded that of the Comptroller and the Bank by one million dollars. From the time of the merger,

February 17, 1982, to the time the Comptroller issued its appraisal, fifteen months passed. It has now been forty-four months since the merger and Beerly still has received no interest or dividend.

Not only was the valuation method employed by the Comptroller unfair but the statutory scheme of §215a disadvantages dissenters by imposing an overwhelming burden on dissenters who pursue the process. Beerly has sacrificed a substantial sum by pursuing his "remedy" under §215a.[9] Only the wealthiest dissenters could afford to follow the arduous and costly procedural path of §215a and that is certainly not what Congress intended. §215a is vague, uncertain and unconstitutional as it applies to the interest question and is counter-productive in its application to the stated goals of Congress.

Other appraisal statutes provide for interest after a final determination. (See *American General Corp.* vs. *Camp*, infra.) §215a is silent on interest and as a result of the Comptroller's decision Beerly not only received a low valuation but the Bank has in effect received an interest free loan for in excess of two years. The majority shareholders of the bank have benefited at the expense of the dissenting minority shareholder. This inequitable treatment is precisely the abuse Congress wanted to prevent, yet the Comptroller and the courts below ignored the fundamental fairness questions properly raised by Beerly.

III §215a IS UNCONSTITUTIONAL AS IT FAILS TO PROVIDE THE PROCEDURAL SAFEGUARD OF A HEARING PRIOR TO A DETERMINATION BY THE COMPTROLLER OF THE COMPENSATION A DISSENTER IS TO RECEIVE AS A RESULT OF THE TENDER OF HIS OR HER SHARES.

This Court in *Voeller*, infra, recognized that appraisal statutes can be utilized to squeeze out dissenters. It is gener-

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9. Even accepting the Comptroller's low appraisal figure, and applying a low 7% investment income return, Beerly has lost this sum.

ally recognized that minority shareholders do have a right not to be subjected to inequitable conduct on the part of the majority, so as to be "destructive of the interests of the minority shareholders." *Lebold* vs. *Inland Steel Co.*, 125 F.2d 369, 374 (7th Cir. 1941). In *Chicago Corp.*, infra, at page 455 the court aptly commented:

> What is the purpose of provisions of statutes which provide for the appraisement of the stock of a person who objects to the merger of the corporation with another? At common law it was in the power of a single stockholder to prevent a merger. When the idea became generally accepted that in the interest of adjusting corporate mechanisms to the requirements of business and commercial growth, mergers should be permitted in spite of the opposition of the minorities, statutes were enacted in state after state which took from the individual stockholder the right theretofore existing to defeat the welding of his corporation with another. In compensation for the lost right a provision was written into the modern statutes giving the dissenting stockholder the option completely to retire from the enterprise and receive the value of his stock in money.

The same Court then says that the shareholder should receive the "value of his stock", which is a "proportional share of an active enterprise which but for the compulsion of others he could continue to be associated with in the indefinite future."

Since the Comptroller determined the value Beerly would receive for his shares, and since the Comptroller valued the stock at less than its true liquidation value, the Comptroller deprived Beerly of his property without due process of law.

When the appraisal statute was first enacted in 1918, it provided for a committee of three persons, one chosen by the bank, one by the dissenters and the third by the two selected

appraisers.[10] Under the original format, the Comptroller would not intervene unless the dissenter was dissatisfied with the committee's appraisal. Under the present statute, the bank can arbitrarily refuse to select a third appraiser, thereby forcing a dissenter to go directly to the Comptroller. (That is exactly what happened in the case at bar). The present statute removes the risk to the bank that the committee might return an appraisal unfavorable to the bank. Under the present statute, the bank has no good reason to appoint a third appraiser and thereby avoid the active intervention of the Comptroller. The dissenter, on the other hand, loses a meaningful procedural step which might obviate the need for the Comptroller's appraisal. The Comptroller would characterize Beerly's actions as voluntary, stemming from the choice of several alternatives. In reality, Beerly had no choice but to apply to the Comptroller to address his claim and protect his administrative review rights.

The Seventh Circuit erred when it refused to consider the interest issue pressed by Beerly. The Petitioner first raised the issue in his Complaint before the District Court in these words:

> "14) No dividends or interest have been paid by the Bank to BEERLY since February 17, 1982, and the Bank remains in possession of the certificates surrendered by BEERLY."

The Seventh Circuit cited *Christmas* vs. *Sanders*, 759 F.2d 1284 (7th Cir. 1985) in support of its position that when an issue is raised for the first time in a reply brief it is raised too late. The application of *Christmas* was inappropriate as the issue was properly before the District Court and the appellate court had full authority to consider it. As the Seventh Circuit recognized, its review of the District Court is plenary and it is as if it were reviewing the Comptroller directly. *Stop H-3 Ass'n.* vs. *Dole*, 740 F.2d 1442 (9th Cir.

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10. 12 U.S.C. 33 et seq. (November 7, 1918)

1984). Regardless of when the issue was raised on appeal, the appellate court had full power and authority to address it.

The procedural safeguards provided by a hearing may well have prevented this inequitable result. The actions of the Comptroller under 12 U.S.C. §215a are a graphic example of the continuing need for the courts to measure such legislation against the protections afforded by the Fifth Amendment. *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). For the reasons set forth herein, this legislation is constitutionally lacking in its protection of the property rights of those similarly situated with Beerly and it should be struck down by this Court.

CONCLUSION

For the foregoing reasons, your Petitioner respectfully prays that this important matter be reviewed by the Supreme Court.

Samuel M. Lanoff
James E. McParland
Thomas H. Luetkemeyer

By: _____
Samuel M. Lanoff

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court and that pursuant to Rules 28.3 and 28.5 (b) of the Rules of the Supreme Court, I this day served three (3) copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit upon counsel for the respondents, required to be served. Such service was accomplished by mailing the copies first-class and postage prepaid to counsel at the following addresses:

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Dated: October , 1985

APPENDIX A

No. 84-1763

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

GUSTAV E. BEERLY, TRUSTEE OF
THE GUSTAV E. BEERLY TRUST,

Petitioner,

vs.

DEPARTMENT OF THE TREASURY, DONALD REGAN,
SECRETARY CONTROLLER OF THE CURRENCY: THE MID-
CITY NATIONAL BANK OF CHICAGO AND MID-CITCO, INC.,
CHARTERED BANK HOLDING COMPANY,

Respondents.

JUDGMENT & OPINION

July 29, 1985

No. 84-1763

JUDGMENT — ORAL ARGUMENT

United States Court of Appeals

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

July 29, 1985

Before

Hon. WALTER J. CUMMINGS, *Chief Judge*
Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. JOHN W. PECK, *Senior Circuit Judge**

GUSTAV E. BEERLY,
TRUSTEE OF THE
GUSTAV E. BEERLY TRUST,
Plaintiff-Appellant,
v.
DEPARTMENT OF THE TREASURY, DONALD REGAN, SECRETARY, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 83 C 4417

Judge Prentice H. Marshall

The cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

* Hon. John W. Peck of the Sixth Circuit, sitting by designation.

In the

United States Court of Appeals

For the Seventh Circuit

No. 84-1763

GUSTAV E. BEERLY, TRUSTEE OF THE GUSTAV E. BEERLY TRUST,

Plaintiff-Appellant,

v.

DEPARTMENT OF THE TREASURY, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 83 C 4417—Prentice H. Marshall, *Judge.*

ARGUED APRIL 12, 1985—DECIDED JULY 29, 1985

Before CUMMINGS, *Chief Judge,* POSNER, *Circuit Judge,* and PECK, *Senior Circuit Judge.**

POSNER, *Circuit Judge.* This appeal requires us to examine the meaning and constitutionality of the little-known statutory provisions for appraisal by the Comptroller of the Currency of shares owned by shareholders dissenting from (1) mergers, consolidations, or conversions of national banks into state banks, 12 U.S.C. §214a; (2) consolidations of national or state banks under the charter of a national bank, 12 U.S.C. §215; or (3) mergers of national or state banks into a national bank, 12 U.S.C. §215a—all transactions that require the Comptroller's approval. The provi-

* Hon. John W. Peck of the Sixth Circuit, sitting by designation.

sions for appraisal go back to 1918, yet, surprisingly in this litigious age, in only one reported case has an appraisal under any of them been challenged. See *Simonds* v. *Guaranty Bank & Trust Co.*, 492 F. Supp. 1079 (D. Mass. 1979).

In the case of a type (3) transaction, the type involved in this case, a dissenting shareholder who gives the proper notice (as was done here) is entitled to receive the "value" of his shares. 12 U.S.C. §215a(b). Value is determined by a committee of three appraisers of which the dissenters select one, the bank resulting from the merger another, and the two party-designated appraisers the third. 12 U.S.C. §215a(c). If any dissenter is dissatisfied with the appraisers' valuation of his shares, or if for some reason one of the appraisers is not appointed, or if the appraisers fail to make an appraisal, then the Comptroller shall on request "cause an appraisal [or reappraisal, if the dissenter was dissatisfied with the appraisers' appraisal] to be made which shall be final and binding" on all parties. 12 U.S.C. §§215a(c), (d). Similar provisions are applicable to transactions of types (1) and (2). See 12 U.S.C. §§214a(b), 215(c), (d).

The Mid-City National Bank of Chicago was merged into Mid-City Bank, N.A., which immediately became a subsidiary of Mid-Citco, a newly formed bank holding company. All three entities are under common ownership, the purpose of the chain of transactions being simply to enable Mid-City National Bank to operate in the bank holding company form. However, the first step—the merger of Mid-City National Bank into Mid-City Bank, N.A., a so-called "interim bank," see 12 C.F.R. §5.21(a)—required the Comptroller's approval under 12 U.S.C. §215a. Beerly, trustee of 2,061 shares, dissented from the merger. When the party-designated appraisers were unable to agree on a neutral appraiser, Beerly, pursuant to 12 U.S.C. §215a(d), requested the Comptroller to do the appraising, who after considering written submissions from the parties fixed a value of $282.39 per share for Beerly's stock. Beerly thought the appraisal too low, sued the Comptroller under 28 U.S.C. §1331, lost in the district court, and

appeals to us. The record is silent on the current price of Mid-City's stock.

Even though section 215a(d) states that the Comptroller's appraisal is "final and binding" on all parties, and no procedure for judicial review of an appraisal is specified, it has not been suggested that Congress wanted to insulate the Comptroller's appraisal from judicial review. We cannot rest on the parties' concession of subject-matter jurisdiction, but our independent analysis leads us to the same conclusion. The presumption that final administrative action substantially affecting personal and property rights is judicially reviewable is a powerful one, see, e.g., *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140-41 (1967), and we can find nothing in the history or setting of the appraisal provisions to overcome it. The valuation of dissenters' shares is a traditional judicial function, see *Simonds* v. *Guaranty Bank & Trust Co.*, *supra*, 492 F. Supp. at 1081-82, and, when performed by an administrative agency rather than a court, invites judicial review. It is not a managerial or political judgment, the kind of judgment that a court cannot usefully review because it lacks the proper analytic tools. The statutory words "final and binding" have no necessary reference to judicial review; they may just mean that the Comptroller's appraisal is the last appraisal.

When no statute prescribes the procedure for judicial review of a particular administrative action, review is in the district court under 28 U.S.C. §1331, the general federal-question jurisdictional statute, see Administrative Procedure Act, §10(b), 5 U.S.C. §703; *General Finance Corp.* v. *FTC*, 700 F.2d 366, 371 (7th Cir. 1983), with a right of appeal to the court of appeals. That was the route followed here.

Our review of the district court's decision is plenary, *Stop H-3 Ass'n* v. *Dole*, 740 F.2d 1442, 1450 (9th Cir. 1984), since that court and this court have the identical information on which to base review of the challenged administrative action, namely the written record compiled in the administrative proceedings. So it is as if we were reviewing the Comp-

troller directly; and the parties agree as they must that the scope of judicial review of the Comptroller's decision is for the usual reasons narrow, deferential. See *E.I. DuPont de Nemours & Co.* v. *Collins*, 432 U.S. 46, 56-57 (1977); *City Federal Savings & Loan Ass'n* v. *Federal Home Loan Bank Bd.*, 600 F.2d 681, 688 (7th Cir. 1979). Thus the issue for us is not whether the Comptroller's decision was correct but whether it was reasonable—not "arbitrary, capricious, [or] an abuse of discretion," 5 U.S.C. §706(2)(A); c.f. *Camp* v. *Pitts*, 411 U.S. 138, 141-42 (1973).

There are many ways to value a share of stock. The Comptroller considered four: book value, adjusted book value, market value, and investment value.

1. Book value is the difference between the firm's assets and liabilities as valued on its books of account, divided by the number of shares. For Mid-City this comes out to $600.10. But the Comptroller gave book value zero weight in his appraisal.

2. Adjusted book value is book value multiplied by the ratio of the market prices of comparable institutions to their book values. The "peer group" used by the Comptroller to determine the adjusted book value of Mid-City stock consisted of other middle-sized Chicago banks. Their stock was selling at an average of 46 percent of book value. Multiplying this by Mid-City's book value per share produced the figure $294.05; this was the stock's adjusted book value.

3. The meaning of market value is self-evident; but because Mid-City's stock had been very thinly traded (only one-quarter of one percent of its stock had been traded in any recent year), the Comptroller decided to give zero weight to this valuation too. The stock's market value was about $160.

4. Finally, the Comptroller computed an "investment value" for Mid-City by multiplying its most recent annual earnings per share by the price-earnings multiple—which was 6—of Mid-City's peer group; and this produced a figure of $270.72. The Comptroller averaged the two figures he had

calculated—the adjusted book value and the investment value—and this yielded his appraisal of $282.39 for each of Beerly's shares.

The methodology of appraisal used by the Comptroller resembles that used in appraising dissenting shareholders' rights under state corporation laws. See, e.g., Fischel, *The Appraisal Remedy in Corporate Law*, 1983 Am. Bar Foundation Research J. 875, 889-96; Note, *The Valuation of a Close Corporation: Glimpses of Objectivity in an Inflationary Period*, 13 Loyola U. L.J. 107, 114-25 (1981); Note, *Valuation of Dissenters' Stock Under Appraisal Statutes*, 79 Harv. L. Rev. 1453, 1456-71 (1966). Although this methodology has frequently been criticized (as in the articles just cited), the fact that the Comptroller was following a conventional approach goes far to shield his results from judicial invalidation. It is not for a reviewing court to tell an administrative agency to defy the conventional wisdom, to innovate, to be daring. And one of the principal criticisms of the conventional methodology of appraisal—that market value is a better index of value than any valuation formula—is, as we shall see, inapplicable to this case. The criticisms of the Comptroller's appraisal that Judge Keeton made in the *Simonds* case, *supra*, 492 F. Supp. at 1084, are also inapplicable.

The purpose of an appraisal is to give the owner of the property being appraised the cash equivalent of what he has given up by relinquishing his ownership. In the case of stock what he gives up is the opportunity to sell the stock or to keep it and obtain an income from it. Ordinarily the best estimate of what an opportunity to sell is worth is found in recent sales of the same thing, which would mean, recent sales of stock in Mid-City National Bank. See, e.g., *Metlyn Realty Corp.* v. *Esmark, Inc.*, 763 F.2d 826, 835-36 (7th Cir. 1985). If the Comptroller had used this method of estimation, it would have turned out very badly for Beerly, because the market value of the stock in the relevant period was only about $160 a share.

It is true that when stock is traded infrequently, past sales may not be a reliable guide to current value, because they impound valuations by only a few buyers and sellers, and because circumstances may have changed since those sales took place. (The other side of the coin is that if a stock has a "thick" market, not only is market value the only rational measure of value, but appraisal rights are unnecessary since the dissenting shareholder can fully protect his interests by selling his shares. On this ground, Delaware does not recognize appraisal rights in such settings. See Del. Gen. Corp. Law §262(b)(1) (1984).) But the fact remains that if Beerly had wanted to cash in his stock he would have had to take his chances in a market in which the demand was weak. Indeed, since he owned 4 percent of the stock of the company—16 times as much stock as had been sold in any recent year—he might not have been able to unload all of his stock at $160 a share.

And it is necessary to distinguish between a "squeeze-out" and a change merely in the form of the shareholder's rights. When a stock is thinly traded, so that its market value is not a reliable index of its true value, controlling shareholders may be tempted at a time when the market valuation is unreasonably low to force minority shareholders to give up their shares in exchange for the market value of the shares, which by hypothesis is less than their true value. But Beerly was not squeezed out; he was offered what appears to have been equivalent shares in the reorganized firm; he left voluntarily. The Comptroller was generous in giving no weight at all to the (low) market value of Beerly's stock.

Book value is a virtually meaningless index of what a share of stock is worth to the shareholder, and the Comptroller properly disregarded it. The main component of book value is the original cost of the firm's assets, as depreciated. Wholly apart from the well-known vagaries of depreciation, if a firm's assets are specialized to the firm's business they may have very little sale value. Their only value may be to generate the firm's earnings. But then it is clear that the value of

the firm is some multiple of its earnings, and not some function of the original cost of its assets. Evidently the book value of middle-sized Chicago banks in the relevant period was greater than their market value, for the stock of Mid-City's "peer group" was trading in the market at an average of only 46 percent of book value per share. Such discounts are common, as any owner of railroad stock knows.

It is true that Beerly presented evidence that some middle-sized Chicago banks had been bought for more than their book value. But there is a big difference between the value of a minority shareholder's interest and the value of a controlling interest, which is what is at stake when the whole firm is acquired and not just some shares of its stock. Someone who thinks he can run a firm better than its present owners—that is, thinks he can get more value out of the firm's assets than they can—naturally will be willing to pay more (if he must) for a controlling interest than the current market value of the firm's stock; that stock is worth more to him. But the qualification is vital; the stock is worth more to him only if he has control of the firm, so that he can run it; and for control he needs more than 4 percent. Of course the analysis would be more complicated if a buyer were not allowed to pay a premium for a controlling block of stock—if he had to pay all shareholders the same price for their shares. But federal law contains no such requirement, which would make transfers of corporate control more costly and therefore reduce the effectiveness of the market for corporate control in disciplining managers and in moving corporate resources into the hands of those who can get the most value out of them. See Easterbrook & Fischel, *Corporate Control Transactions,* 91 Yale L.J. 698 (1982). All shareholders may be better off, ex ante, with a rule that facilitates takeovers, even though, ex post, some may get lower prices for their shares if a takeover occurs.

The two measures of value that the Comptroller used are more consonant with economic reality than book value is and more favorable to Beerly than market value. The Comptrol-

ler's "adjusted book value" was essentially a measure of the market value of a portfolio of comparable banks, and thus corrected for the thinness of the market in Mid-City's own stock. The Comptroller's "investment value" assumed quite sensibly that the value of bank stock is as an income-producing asset and is therefore a function of the bank's income. The precise form of that function depends on investors' estimates of the riskiness of the bank's stock and the prospects for the bank's future earnings; and while it is possible that Mid-City is less risky than its peers or has brighter prospects, the Comptroller was entitled to assume, in the absence of more direct evidence of Mid-City's prospects, that investors were unlikely to consider it a more valuable asset, per dollar of earnings, than a portfolio of stocks of similar banks.

The two measures the Comptroller used are closely related. In effect he made two adjustments to the average market value of the stock of the peer firms to derive the market value of Beerly's shares in Mid-City: He multiplied it first by the ratio of Mid-City's book value to the peer group's average book value and then by the ratio of Mid-City's earnings to the peer group's average earnings, and then he took the average of these two products. He assumed, in other words, that Mid-City's stock would be worth more, relative to the market value of comparable banks' stock, the more its book value exceeded the average book value of the comparable banks and the more its earnings exceeded their earnings. This is a defensible procedure (ratios of book values may be a little more meaningful than absolute book values), and on the whole one generous to Beerly.

The Comptroller gave no weight to the appraisal made by Beerly's own appraiser, in the aborted private appraisal that preceded the Comptroller's intervention: $743.77. But, contrary to Beerly's suggestion, the Comptroller was not required to average that appraisal with his own in coming up with a valuation for Beerly's shares. If the parties had agreed on a neutral appraiser, he would not have averaged his own

estimate with those of the party-designated appraisers. People estimate value differently, and there is no difficulty in finding an expert from the upper tail of the distribution. *Metlyn Realty Corp.* v. *Esmark, Inc., supra,* 763 F.2d at 836. The search for extremes in valuation should not be encouraged by requiring that the highest appraisal be averaged in with the others.

The most questionable feature of the Comptroller's valuation (apart from his giving no weight to the bank's market value—an omission that favored Beerly, however) was the refusal to count any part of the bank's reserve for bad loans as an asset, rather than a liability. The reserve, $2 million, had remained unchanged for many years during which the bank wrote off an average of only $10,000 a year in bad loans. The recent and well-publicized difficulties of large Chicago banks, together with the uncertainties that may have been created by the deregulation (though as yet partial) of banking, seem to confirm the prudence of the Comptroller's conservative approach to bank reserves—and in any event we can think of few areas less suitable for judicial second-guessing than the Comptroller's determination of how large a reserve is suitable for a bank of Mid-City's size and condition. But the point is not whether the Comptroller acted reasonably in requiring a large reserve for bad loans; it is whether investors would have considered the reserve excessive, for if so they would have treated the excess as an asset rather than a liability in valuing the firm. However, an adjustment to take account of this possibility would not have altered the appraisal significantly. The reserve was equal to only 7 percent of the bank's book value. Suppose it was twice as large as investors would have thought proper. The effect on adjusted book value (equal to 46 percent of book value) would be to increase the value by only 1.6 percent (46 percent of 3.5 percent is 1.6 percent); and since adjusted book value was given a weight of one-half in valuing Beerly's stock, the result would be a less than 1 percent (0.8 percent, to be precise) increase in the value of his stock. If there was an error in the treatment of the reserve for bad loans—and that is uncertain—it was trifling.

We do not understand Beerly's complaint that the bank paid lower dividends than comparable banks. That would just go to increase the bank's capital, and hence book value, and hence the valuation of Beerly's shares.

Beerly argues that the statutory procedure for appraisal by the Comptroller violates the Fifth Amendment's due process clause because it does not provide for an evidentiary hearing. Although the due process clause comes into play only when there is a deprivation of life, liberty, or property, there was a deprivation of property here. Granted, the merger itself did not deprive Beerly of his stock. He was not squeezed out; he opted out; he could have exchanged his stock for shares in the interim bank. But the new shares would not have been the exact equivalent of the old; at common law he could have vetoed the transaction, *Chicago Corp.* v. *Munds*, 20 Del. Ch. 142, 149, 172 Atl. 452, 455 (1934); a forced exchange is still a deprivation. A less metaphysical point is that once Beerly chose appraisal, as the statute entitled him to do, he was stuck with the results of that appraisal; and if the Comptroller violated due process of law in conducting the appraisal, and as a consequence valued Beerly's stock at less than the minimum reasonable estimate of its true value, the Comptroller could be said to have deprived him of property without due process of law. It is true that we have found the valuation reasonable, but this conclusion is based on the record compiled by the Comptroller; if that record is tainted by his failure to accord Beerly a hearing, our conclusion is undermined. So we must determine whether the procedure denied Beerly due process.

The process that is due depends on the nature of the inquiry. Since time out of mind, appraisal by informal procedures not involving oral hearings has been used to value property, including property as valuable as Beerly thought his stock was. Generally, appraisers are not arbitrators; they do not weigh in a trial setting conflicting opinions of value that have been subjected to cross-examination; they make their own evaluation. See *Hayes* v. *Allstate Ins. Co.*, 722 F.2d 1332,

1340 (7th Cir. 1983) (dissenting opinion) (citing cases). The procedures for valuing dissenting shareholders' rights under state law is various. See 12B Fletcher Cyclopedia of the Law of Private Corporations §5906.8 (Van Swearingen rev. ed. 1984). In some states the court does the appraising; in others appraisers are appointed and use their own judgment in valuing the shares; in still others the appraisers take evidence before making their valuation. In none so far as we know is an oral evidentiary hearing with cross-examination either required or customary. The procedure used by the Comptroller in this case was as formal as any used in cases of this general nature and more formal than many.

Thus if the appraisers designated by the parties had been able to agree on a neutral appraiser, and the committee of appraisers had then set about to appraise Beerly's stock, in all likelihood it would not have done so with an oral hearing or any of the other traditional accouterments of formal procedure. We need not decide, however, whether the Comptroller could, consistently with due process, have proceeded as informally as private appraisers. He weighed the written submissions by Beerly and the bank and having done so made his appraisal in a reasoned opinion that considered all of Beerly's evidence and argument. The only thing missing was oral testimony and the opportunity for cross-examination. Beerly has not shown how the use of these expensive and time-consuming procedures would have reduced an otherwise high probability of a serious error in the appraisal. The procedure was therefore constitutionally adequate. See, e.g., *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976); cf. *Richardson* v. *Perales*, 402 U.S. 389, 402 (1971); *Chicago & North Western Transport. Co.* v. *United States*, 678 F.2d 665, 671 (7th Cir. 1982).

Beerly's final complaint is that the statute makes no provision for the payment of interest. The merger took place in February 1982, and that fixed the date for valuing Beerly's shares. The Comptroller made his valuation in June 1983, about 15 months later. Assuming purely for illustrative pur-

poses that the market rate of interest on such an investment was 9 percent, Beerly lost $65,000 as a result of the delay between the merger and the valuation. The delay was not unreasonable, but the consequences for Beerly's wealth position were significant and, he argues, unreasonably deprived him of property. But we shall not consider the merits of the argument. It appeared for the first time in Beerly's reply brief. That was too late. *Christmas* v. *Sanders*, 759 F.2d 1284, 1291-92 (7th Cir. 1985).

AFFIRMED.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

No. 84-1763

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

GUSTAV E. BEERLY, TRUSTEE OF THE GUSTAV E. BEERLY TRUST,

Petitioner,

vs.

DEPARTMENT OF THE TREASURY, DONALD REGAN, SECRETARY CONTROLLER OF THE CURRENCY: THE MID-CITY NATIONAL BANK OF CHICAGO AND MID-CITCO, INC., CHARTERED BANK HOLDING COMPANY,

Respondents.

ORDER

August 30, 1985

No. 84-1763

United States Court of Appeals

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

August 30, 1985

Before

Hon. WALTER J. CUMMINGS, *Chief Judge*
Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. JOHN W. PECK, *Senior Circuit Judge**

GUSTAV E. BEERLY, Trustee of the Gustav E. Beerly Trust,
Plaintiff-Appellant,
No. 84-1763 *v.*
DEPARTMENT OF THE TREASURY, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 83 C 4417

Prentice H. Marshall, *Judge*

ORDER

On August 9, 1985, plaintiff-appellant filed a petition for rehearing. All of the judges on the original panel have voted to deny the petition. The petition is therefore DENIED.

* Hon. John W. Peck of the Sixth Circuit, sitting by designation.

APPENDIX C

No. 84-1763

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

GUSTAV E. BEERLY, TRUSTEE OF
THE GUSTAV E. BEERLY TRUST,

Petitioner,

vs.

DEPARTMENT OF THE TREASURY, DONALD REGAN,
SECRETARY CONTROLLER OF THE CURRENCY: THE MID-
CITY NATIONAL BANK OF CHICAGO AND MID-CITCO, INC.,
CHARTERED BANK HOLDING COMPANY,

Respondents.

ORDER

September 19, 1985

No. 84-1763

United States Court of Appeals
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

September 19, 1985
Before
Hon. RICHARD A. POSNER, *Circuit Judge*
Hon.
Hon.

GUSTAV E. BEERLY, Trustee of the Gustav E. Beerly Trust,
Plaintiff-Appellant,
No. 84-1763 *v.*
DEPARTMENT OF THE TREASURY, DONALD REGAN, SECRETARY, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 83 C 4417
Judge Prentice H. Marshall

This matter comes before the court for its consideration of "MOTION OF GUSTAV E. BEERLY TRUSTEE OF GUSTAV E. BEERLY TRUST TO RECALL AND STAY THE MANDATE OF THIS COURT'S AUGUST 30, 1985 DECISION" filed herein on September 13, 1985, by counsel for the plaintiff-appellant.

On consideration thereof.

IT IS ORDERED that motion to recall and stay the mandate is DENIED.

APPENDIX D

No. 83 C 4417

United States District Court

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GUSTAV E. BEERLY, TRUSTEE OF
THE GUSTAV E. BEERLY TRUST,

Petitioner,

vs.

DEPARTMENT OF THE TREASURY, DONALD REGAN,
SECRETARY CONTROLLER OF THE CURRENCY: THE MID-
CITY NATIONAL BANK OF CHICAGO AND MID-CITCO, INC.,
CHARTERED BANK HOLDING COMPANY,

Respondents.

MEMORANDUM OPINION

April 12, 1985

D-2 No. 83-4417

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GUSTAV E. BEERLY, TRUSTEE OF THE GUSTAV E. BEERLY TRUST,
Plaintiff,

v.

DEPARTMENT OF THE TREASURY, ET AL.,
Defendants.

No. 83 C 4417

MEMORANDUM OPINION

Prentice H. Marshall, District Judge

This action is brought pursuant to the Administrative Procedure Act (APA), 5 U.S.C. §§701-06 (1982), for judicial review of an appraisal of bank stock by defendant, the Comptroller of the Currency (the Comptroller), made under the Bank Merger Act, 12 U.S.C. §215a (1982). Plaintiff, Gustav E. Beerly, trustee of the Gustav E. Beerly Trust, objects to the valuation of his stock in defendant Mid-City National Bank (Mid-City) by the Comptroller after the merger of Mid-City with defendant Mid-Citco, Inc. (Mid-Citco). In the complaint, plaintiff alleges that the Comptroller's valuation was arbitrary and capricious and not in accordance with the law, constituted a taking without just compensation, and deprived him of property without due process of the law.

Mergers between national banking associations are governed by 12 U.S.C. §215a. Section 215a(a)(2) requires for a merger between two banks the vote of the owners of two thirds of the outstanding stock in the acquired bank as well as the approval of the Comptroller. Section 215a(b) entitles a shareholder who dissents to the merger to receive the value of

his stock. The dissenting shareholder must object to the merger in writing before or at the time of the vote on the merger. If the merger passes, he is then entitled to receive the value of the stock at the time the Comptroller approves the merger. To receive the value of his shares, the dissenting shareholder must make a written request to the acquiring bank and surrender his stock certificates. *Id.* The value of the stock is ordinarily determined by an appraisal committee composed of one member of the dissenter's choice, one member of the acquiring bank's choice, and one person selected by the other two members. *Id.* §215a(c). If two or more appraisers agree on the value of the stock, that value governs. *Id.* If one of the members of the appraisal committee is not selected, then an interested person may request in writing that the Comptroller determine the value of the stock. That determination is binding on all persons. *Id.* §215a(d). The statute provides no guidance as to how the Comptroller is to appraise the stock. Nor have any regulations been promulgated setting forth the method of bank stock valuation.

In late 1981 plans to merge Mid-City into Mid-Citco were announced. Plaintiff executed a proxy requiring that his shares be voted against the merger. Two thirds of the outstanding stock of Mid-City was voted in favor of the merger, however, and the Comptroller approved the merger. Within thirty days of the merger, plaintiff requested in writing the value of his stock and delivered his stock certificates to Mid-City. Seven other shareholders in Mid-City dissented from the merger and requested payment for their stock. Both Mid-City and plaintiff selected their representatives for the appraisal committee, but they could not agree on a third appraiser. Hence, plaintiff requested the Comptroller to appraise the stock of the dissenters.

By letter, the Comptroller notified the interested parties that he would appraise the stock and that they could submit to him written information that he should consider in appraising the stock. Administrative Record (A.R.) 58-59. Plaintiff, two other dissenting shareholders, and Mid-City

submitted information to the Comptroller. The Comptroller concluded in his report that the value of the stock was $282.39 per share. Plaintiff brought this action to review the decision of the Comptroller. All defendants have moved for summary judgment, and plaintiff has filed a cross-motion for summary judgment.

The Comptroller's determination of the value of plaintiff's stock is an agency decision subject to judicial review under the Administrative Procedure Act (APA), 5 U.S.C. §§701-06 (1982). *Simonds* v. *Guaranty Bank & Trust Co.*, 492 F. Supp. 1079, 1081 (D. Mass. 1979). *See also Camp* v. *Pitts*, 411 U.S. 138 (1973) (holding Comptroller's decision refusing to authorize organization of new bank subject to judicial review under the APA). Section 706 of the APA defines the standard of review to be applied to an agency action. Because in an appraisal of stock no hearing takes place, nor is a hearing required by statute, the Comptroller's decision may be set aside only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A); *Simonds*, 492 F. Supp. at 1082. Whether an agency action is arbitrary and capricious depends on "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment," *Citizens To Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971), or whether it had "a rational basis in the record." *First Union Bank & Trust Co.* v. *Heimann*, 600 F. 2d 91, 95 (7th Cir. 1979).

Plaintiff argues that under *Simonds* v. *Guaranty Bank & Trust Co.*, the Comptroller's decision was arbitrary and capricious. There the court invalidated a valuation of bank stock by the Comptroller because the Comptroller had applied a rigid formula in his appraisal without giving reasons for his method. The Comptroller determined sums representing the bank's book value, market value, and investment value. To fix the value of the bank stock, the Comptroller took the average of the three sums. The court held that the Comptroller's adherence to the strict formula without considering the spe-

cific bank involved or explaining why he employed the formula was arbitrary and capricious.

> [D]efendant Comptroller gave equal weight to each of the three elements of value he considered without articulating his reason for doing so . . . In the absence of an explanation of the reason for this course of action . . . and in light of the substantial disparity between the third element, "investment value," and the other two, the inference is compelling that the Comptroller was applying a rigid formula rather than exercising his judgment.

Id. at 1084. In the instant case, the Comptroller wrote a report explaining every step and demonstrating that he considered factors unique to Mid-City in his appraisal.

In his determination here the Comptroller mentioned four methods of valuing stock: book value, adjusted book value, market value, and investment value. A share's book value is determined by dividing the bank's net worth by the numer of outstanding shares of stock. At the time of the shareholder vote on the merger, the book value of Mid-City stock was $598.86. The Comptroller discredited the use of book value in figuring the value of stock. Among the flaws in the book value method, the Comptroller noted, is that the determination of a company's net worth is not based on the current value of the company's assets and liabilities, but rather on the historical value of assets and liabilities. Attempts to adjust to current value are of limited accuracy because readily available data is often lacking and "the approach does not account for the value of the assets and liabilities in an on-going institution, but rather assigns them liquidation values." A.R. 149.

Adjusted book value is determined by multiplying the book value by the average ratio of market price to book value of comparable banks. The ratio reflects "the premium or discount to book value which investors attribute to the condition and prospects of these organizations." *Id.* The Comptroller

defined Mid-City's peer group as those independent banks in the Chicago area with assets between $100,000,000 and $300,000,000 for which market value was ascertainable. One bank fitting the peer group description was excluded from the group because its earning history was not comparable to others in the peer group. The average ratio was multiplied by Mid-City's book value to reach a figure of $294.05.

Because Mid-City's stock had been "thinly traded," the Comptroller could not determine a reliable market value. Mid-Citco reported to the Comptroller that less than .25% of Mid-City's outstanding stock had been traded each year since 1978. The most recent sale of stock in March, 1981 was for $160. A.R. 150. Hence, the Comptroller ascribed no weight to market value.

The final method of valuation was the investment value, a method intended to reflect the bank's future earning prospects. To determine the investment value, the Comptroller multiplied earnings per share by an earnings multiplier. The Comptroller arrived at an earnings per share figure by looking to Mid-City's 1981 earnings. 1982 earnings were not considered because a substantial deviation from Mid-City's past earnings record occurred. Earnings per share for 1981 were $45.12. The Comptroller then determined a multiplier by using the price/earnings ratio of the same peer group of banks that had been considered to determine adjusted book value. Again, the bank with disparate earnings was excluded from the computation. After multiplying the earnings per share by the price/earnings ratio, the Comptroller fixed the investment value at $270.72 per share. A.R. 151.

The Comptroller took the average of the investment value and the adjusted book value in reaching the value of the stock, $282.39. Neither straight book method nor market value were given weight in his determination.

The plaintiff complains that the Comptroller's method was comparable to that employed in *Simonds*, and that therefore, the decision on the value of the stock must be set aside.

In contrast to *Simonds*, however, the Comptroller here explained his valuation. He gave reasons why book value would not be considered. He also explained that he could not take market value into account because market value was impossible to ascertain due to sparse trading. The Comptroller further stated that adjusted book value was an appropriate gauge of the banks' worth because it took account of the bank's assets and the market rate for other comparable bank stock. Finally, investment value served to consider the bank's earnings prospects. Also, the Comptroller considered factors peculiar to Mid-City, for example, Mid-City's failure to provide for loan losses on an annual basis. Unlike *Simonds*, the Comptroller used reasoned discretion rather than applying a rigid formula.

Plaintiff complains that the Comptroller's rejection of book value was arbitrary and capricious. Commentators have recognized the same flaws in the book value method to which the Comptroller referred. *See* Note, The Valuation of a Close Corporation: Glimpses of Objectivity in an Inflationary Period, 13 Loy. U. Chi. L.J. 107, 122 (1981); Note, Valuation of Dissenter's Stock, 79 Harv. L. Rev. 1453, 1457 (1966). The Secretary's decision to discount book value then is not without support. Although differing opinions may exist as to the propriety of considering book value, we may not substitute our judgment or plaintiff's judgment for the Comptroller's judgment in the absence of a clear error of judgment. *Overton Park*, 401 U.S. at 416. Since the Comptroller's rejection of book value was not a clear error of judgment, the decision was not arbitrary and capricious.

Plaintiff also complains that the Comptroller failed to take into account submissions on the behalf of the dissenting shareholders indicating that stock in Chicago area banks had been sold at values between 1.3 and 1.5 times the book value of the stock. A.R. 47, 77-78, 144. Because the sales to which the dissenters referred involved controlling interests in the banks, however, the Comptroller concluded that use of the proposed rates was inappropriate: "As these shares [in

Mid-City] do not represent a controlling interest, such a premium over book value is not considered appropriate in this situation." A.R. at 151. Plaintiff argues that in valuing stock, the Comptroller erroneously differentiated between controlling interests and minority interests and that in a valuation, the worth of stock should be the same. What the Comptroller did in this case was to recognize that in corporate acquisitions, achieved through the acquisition of stock, the acquiring entity pays a premium in excess of the value of the stock to acquire a controlling interest. Of course all shares purchased are purchased at the same high price. The acquiring entity is willing to pay the higher price because the total of the shares purchased will constitute a controlling interest. When, as in this case, the acquisition is made through a sale of assets, rather than stock, the payment of a premium for shares of stock is inappropriate. 2 B. Fox & E. Fox, Corporate Acquisitions & Mergers §26.02 at 26-2 (1975). The Comptroller's rejection of the rates paid for shares constituting a controlling interest in other banks was, therefore, a reasonable position, and not a clear error of judgment.

Plaintiff further complains that the Comptroller failed to include Mid-City's loss reserve as an asset. The Comptroller decided not to consider the loss reserve as an asset because Mid-City had a policy for several years of maintaining a large loss reserve. The large loss reserve was not intended to shelter income to avoid paying dividends to shareholders in expectation of a planned takeover. Because the large loss reserve was an ongoing policy not intended to defraud the bank's shareholders, the Comptroller did not include it as an asset. Also, Mid-City has made no yearly provision for losses since 1977, so the loan loss reserve had not increased. Mid-City's failure to provide for loan losses on its income statement meant that the loss reserve, which had not grown since the last provision for loss had been made in 1977, should not be considered an asset of Mid-City.

Finally, plaintiff objects that the Comptroller failed to take into account the extremely low dividends paid by

Mid-City since 1977. If Mid-City retained its earnings rather than paying out dividends, then its assets would be higher. Since assets are included in the determination of adjusted book value, to which the Comptroller gave weight, the Comptroller, at least indirectly, gave weight to Mid-City's low dividends.

Because the Comptroller's computation of the value of Mid-City stock was based on relevant considerations and because the Comptroller adequately explained his findings, we cannot set aside his appraisal on the ground that it was arbitrary and capricious.

In addition to the claim that the Comptroller acted arbitrarily and capriciously is the claim that the statute and the Comptroller's actions pursuant to the statute constituted a deprivation of property without due process of the law and a taking without just compensation. In addition to the arbitrary and capricious standard, agency actions are to be set aside if "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. §706(2)(B).

The fifth amendment provides that "private property [shall not] be taken for public use, without just compensation." Here, the government did not take plaintiff's stock. Nor was plaintiff's stock put to public use. Hence, no taking under the fifth amendment took place, and whether just compensation was received need not be determined.

Nor does the statute enable the Secretary to deprive plaintiff of property without due process of law. Even if an inadequate appraisal could deprive a shareholder of his property, plaintiff received due process. *Mathews* v. *Eldridge*, 424 U.S. 893 (1976) explains that the requirements of due process vary depending on three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probably value, if any, of additional or substitute procedural safeguards; and finally, the

> Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335. Here, the interest affected is plaintiff's interest in receiving full value for his shares. The second factor, the adequacy of the procedure used in avoiding an erroneous deprivation strongly indicates that the procedures used in the instant case satisfied due process. Plaintiff had ample opportunity to present evidence on his behalf. In his request to the Comptroller for valuation, he included the appraisal performed by the person he had selected for the appraisal committee. When the Comptroller agreed to conduct the valuation, he invited interested persons to submit information for his consideration in the appraisal. In response to the Comptroller's letter, plaintiff sent a letter from a bank president stating that the current market rate at which bank stock was selling was 1.3 to 1.5 times the book value. A.R. 144. Another dissenting shareholder sent a letter arguing that the stock should be valued in excess of the book value. A third dissenter sent a newspaper article on the sale of another Chicago bank at 1.5 times the book value. A.R. 77-78. Mid-Citco sent the appraisal by its member of the appraisal committee stating why that appraisal was excessive. The Comptroller acknowledged that he had considered these submissions, but gave them no weight. A.R. 151-52. In the context of stock valuation, a hearing would have added little toward reaching the correct result. Any information relevant to the value of bank stock could have been provided to the Secretary in writing. No questions of credibility were involved. A requirement that the Comptroller hold a hearing in determining the value of bank stock would create an added fiscal and administrative burden on the government with little benefit toward accurately valuing stock. The Comptroller's procedure of notifying interested persons of the valuation and inviting written submissions satisfies due process.

Because the Comptroller's action was not arbitrary and capricious and did not violate the fifth amendment, defendants' motion for summary judgment is granted. Plaintiff's motion for summary judgment is denied. Judgment will enter dismissing the complaint.

ENTER:

Prentice H. Marshall
District Judge

DATED: April 12, 1984.

APPENDIX E

Comptroller of the Currency

ADMINISTRATOR OF NATIONAL BANKS

GUSTAV E. BEERLY, TRUSTEE OF
THE GUSTAV E. BEERLY TRUST,

and

MID-CITY NATIONAL BANK OF CHICAGO

Respondent.

APPRAISAL OF DISSENTING SHAREHOLDERS STOCK

June 13, 1983

[Letterhead of the Comptroller of the Currency
Administrator of National Banks]

June 13, 1983

Mr. John P. Madigan
Morgan, Lanoff, Denniston and Madigan, Ltd.
Suite 2700
One First National Plaza
Chicago, Illinois 60603

Dear Mr. Madigan:

This is in reference to our letter of November 23, 1982, which stated that this Office would conduct an appraisal of the stock of shareholders dissenting from the merger of The Mid-City National Bank of Chicago, Chicago, Illinois, into Mid-City Bank, National Association, Chicago, Illinois, an interim bank formed to facilitate the acquisition of The Mid-City National Bank of Chicago by Mid-Citco, Incorporated, a bank holding company. The appraisal was conducted pursuant to 12 U.S.C. 215a(d) since an appraisal committee was not formed.

Please be advised that we have caused an appraisal to be made. The value of the shares of The Mid-City National Bank of Chicago has been determined to be $282.39 per share as of February 17, 1982 (the effective date of the merger). The report of appraisal is enclosed for your consideration.

The appraisal value as noted above shall be final and binding on all parties in accordance with the provisions of 12 U.S.C. 215a(d). The Mid-City National Bank of Chicago has been notified of the results of our appraisal.

Very truly yours,

/s/ JAMES E. BRENNAN
James E. Brennan
Manager, Bank Structure Analysis
Bank Organization and Structure

Enclosures

cc: Mr. Dale M. Hathaway
Ms. Annaliese Hass
Mr. Richard Flodin
Ms. Margot Bloch
Mr. Ralph P. Miller
Mrs. Stanford W. Flodin
Mr. Harvey C. Flodin

APPRAISAL OF DISSENTING SHAREHOLDERS' STOCK THE MID-CITY NATIONAL BANK OF CHICAGO
Chicago, Illinois

On February 17, 1982, The Mid-City National Bank of Chicago, Illinois ("Mid-City"), was merged into Mid-City Bank, National Association, Chicago, Illinois, an interim bank. The merger was pursuant to authorization by shareholders owning more than two-thirds of the outstanding common stock, by vote at a shareholder's meeting of Janaury 14, 1982. The merger was part of a plan to facilitate a corporate reorganization whereby Mid-Citco, Incorporated ("Mid-Citco"), was to acquire 100 percent of the resulting bank. Shareholders of Mid-City were offered one share of Mid-Citco stock in exchange for each share of stock held in the merged bank.

At the shareholders' meeting, eight shareholders representing 2,395 shares (4.79%) dissented in the vote and perfected their rights as dissenting shareholders under 12 U.S.C. 215a. As provided by statute, two appraisers were selected, one by majority vote of the dissenting shareholders and the other by the directors of the receiving institution; however, the appraisers chosen were unable to agree upon a third appraiser, as directed in 12 U.S.C. 215a. Consequently, on October 11, 1982, legal counsel representing the dissenting shareholders requested that the Comptroller of the Currency undertake an appraisal of the value of the dissenting shareholders' stock. This appraisal will be as of the date of consummation of the merger, February 17, 1982.

All of the dissenting shareholders and the President of Mid-City National Bank of Chicago were notified by letter dated November 23, 1982, that an appraisal would be performed by this Office. The dissenting shareholders and the resulting bank were advised of their right to submit, within thirty days, any information, documentation or argument that they deemed pertinent for consideration in the appraisal

process. Both parties made submission to the Public File during that time period.

METHODS OF VALUATION

Several alternative methods may be applied to estimate the value of a bank's shares. Following are the various valuation methods considered for the appraisal of shares held by the dissenting shareholders of Mid-City.

Book Value

As of December 31, 1981, Mid-City had total equity capital of $29,943M and 50,000 shares of common stock outstanding. Consequently, book value as of that date was $598.86. Book value as of February 17, 1982, had increased to $600.10.

Book value, however, is not considered to be an accurate measure of the value of an equity interest because it is based upon the historical cost of the bank's assets and liabilities. These book values could be adjusted to reflect prevailing prices and yields in order to obtain a current net asset value, however, there are two significant limitations to such adjustments. First, not all relevant current values can be determined from readily available data and the resulting net asset values could be seriously distorted. Second, this approach does not account for the value of the assets and liabilities in an on-going institution, but rather assigns them liquidation values. As an alternative, an approach can be used in which the book value is adjusted while taking into consideration the bank as a going concern.

Adjusted Book Value

An adjusted book value is reached by applying to book value the average ratio of market price to book value for a group of comparably situated banking organizations whose shares are actively traded. This average ratio measures the premium or discount to book value which investors attribute to the condition and prospects of these organizations and this average is then applied to the bank stock being appraised.

The peer group (see Table I) is comprised of independent banks operating in Chicago with total assets ranging from $100-$300 million as of December 31, 1981, for which market price data was available. Table II displays the ratio of market price per share to book value per share for the peer group, for a period of four years from 1978 to 1981. Because Merchandise National Bank's recent earnings history (including losses resulting from sale of securities in 1980 and relatively low net income during 1979 and 1981) is not comparable to Mid-City's earnings trend, its ratio was excluded in arriving at a peer group average. Multiplying Mid-City's book value by the average of this ratio for 1981, results in an adjusted book value of $294.05.

Market Value

Prior to the merger, stock in Mid-City was thinly traded. In their submission, Mid-Citco indicates that no more than .25% of outstanding stock was traded in any one year since 1978 (see Table III). Consequently, the market value as of the most recent trade (March, 1981) of $160.000 per share is not reliable.

Investment Value

The investment value approach may be used to confirm the market price when an active market exists or to establish a proxy for market value in the absence of reliable market value. This valuation methodology is designed to derive an appraisal based upon an analysis of the bank's condition and future earnings prospects as these factors would be perceived by a potential investor. As such, this methodology should be consistent with the valuation processes investors would apply to establish a market price for the security.

Although several alternative investment valuation techniques exist, by far the most common technique is the earnings multiplier. This technique involves the selection of an appropriate price/earnings multiple and the determination of potential earnings capacity. The combination of reasonable

estimates for the price/earnings multiple and earnings per share results in an investment valuation of the bank's stock.

Earnings Per Share

Due to the variability of a firm's earnings over time, an estimate of future earnings prospects requires a judgment of the bank's probable earnings capacity. Although historical earnings do not necessarily indicate potential earnings capacity, historical earnings are a reasonable guide to earnings prospects. The analysis of historical earnings should include an assessment of both variability and the trend in earnings.

The pattern of Mid-City's earnings over the four year period from 1977 through 1980 as presented in Table IV, reflects a stable but gradual earnings growth. The deviation from this pattern in 1981 appears to be directly attributable to the large increase in interest expense experienced throughout the banking system during 1981 and continuing into the first half of 1982. Because of the size and nature of this variance it would not be meaningful to develop an estimate of future earnings derived from the earnings experience of Mid-City over time. Instead, earnings for 1981 will be used as the most likely estimate of the bank's on-going earnings potential.

Mid-City made no provision for loan losses during the period 1977 through 1981 (See Table V); however for those years in which the bank experienced net recoveries, a negative provision was made to return those recoveries to undivided profits. The bank's actual loss/recovery experience during that period, together with the size of the remaining Loan Loss Reserve balance would be consistent with this decision. Consequently, the Net Income figure for 1981, using the negative provision (recovery) was used, resulting in an earnings per share of $45.12.

Price/Earnings Multiple

Whereno active market in the bank stock exists, a price/earnings (P/E) multiple may be estimated based upon

the average P/E of a group of similarly situated banks. The P/E ratios for the peer group of independent Chicago banks with total assets ranging from $100-$300 million, for which market data is available, as of December 31, 1981, are shown in Table VI. The aberrant ratio for Merchandise National Bank was due to its poor earnings trend and was therefore omitted when computing the average. The resulting average P/E was 6.0x. This multiple reflects investors' perceptions of the market value of a group of stocks for institutions comparable to Mid-City and, as such, is considered to be applicable in estimating market value for Mid-City's stock.

An investment value canbe calculated by multiplying the price/earnings multiple by the bank's estimated earnings capacity of $45.12 per share, resulting in a value of $270.72 per share.

Consideration of Materials Submitted by Interested Parties

Dissenting shareholders Harvey C. Flodin and Gustav E. Beerly, Trustee (represented by John P. Madigan)[1] cited prices paid during recent Chicago-area bank mergers renging from 1.3 to 1.5x book value, and indicated that they felt such a range would provide an appropriate value for dissenting shares. The examples provided all relate to acquisition situations, in which one bank was offering a price for a controlling interest in another institution. As these shares do not represent a controlling interest, such a premium over book value is not considered appropriate in this situation.

In their submission dated October 11, 1982, the dissenting shareholders also included an appraisal performed on their behalf.[2] This appraisal contends that the Reserve for Loan Losses was overly conservative and should properly be considered to be equity when arriving at book value per share. While the Reserve is quite large relative to Mid-City's loan

1. by letters dated December 9, 1982 and December 23, 1982 respectively

2. by George E. Jacobsmeyer, dated May 17, 1982

loss experience and the figures for comparable banks, this maintenance of a large reserve has been a policy at Mid-City for at least the past five years and did not represent an effort to shelter earnings or equity from distribution to shareholders in anticipation of the corporate reorganization. In addition, the lack of a provision for loan losses since 1977 constitutes a de facto adjustment to the reserve. Consequently, the Reserve was not included as equity in these computations.

Appraisal of Value

The appraisal of dissenting shareholders' stock requires that the individual valuation methodologies be reviewed and that a reasonable value be derived from one or a combination of methodologies. With regard to The Mid-City National Bank of Chicago, Chicago, Illinois, the following valuation methodologies were applied:

Methodology	Appraisal		Weight		Weighted Value
Book Value	$600.00	x	0	=	0
Adjusted Book Value	$294.05	x	.50	=	$147.03
Market Value	$160.00	x	0	=	0
Investment Value	$270.72	x	.50	=	$135.36
					$282.39

An unadjusted book value is not considered appropriate for reasons previously discussed. Briefly, it does not present the value of the bank on a going concern basis and reflects historical costs which, due to inflation and interest rate influences, are not an accurate reflection of current value.

Due to the absence of any regular trading in Mid-City's stock, no reliable market value is available.

The adjusted book value and investment value methodologies both present appraisal values which are based on the bank's merits as a "going concern". These two methods do differ, however, in their emphasis; the adjusted book value

methodology is asset-based, whereas the investment methodology is income-based.

In this instance the investment value was predicted upon one year's net income apparently resulting from the impact of interest rate changes upon the bank's asset and liability structures. Consequently, both methods are accorded equal weight.

This appraisal finds $282.39 to be the value per share of the bank as of February 17, 1982.

Table I

Peer Group

Peer group is comprised of national banks:

- total assets of $100 to $300MM
- located in Chicago, Illinois
- independent
- 0 to 2 branch offices
- for which market data is readily available

Bank Name	Total Assets 12-31-81 (in millions)	ROE 1981	ROA 1981
Albany Bank & Trust Co., National Association	$138,384	11.11	.72
Marquette National Bank	229,088	9.90	1.15
Marchandise National Bank	162,118	1.53	.10
Uptown National Bank of Chicago	108,383	5.50	.56
The Mid-City National Bank of Chicago	212,963	7.80	1.05

Table II

Ratio of Market Price Per Share to Book Value Per Share

Bank Name	1978	1979	1980	1981
Albany Bank & Trust Co., National Association	.93	.75	.71	.68
Marquette National Bank	.43	.52	.49	.36
Merchandise National Bank	.39	.39	.40	.36
Uptown National Bank of Chicago	.52	.49	.49	.43
Average	.57	.54	.52	.46
Average excluding Merchandise National Bank	.63	.59	.56	.49

Table III

Common Stock Trading Volume 1

Date	Number of Shares Sold (2)	Price Per Share
July, 1978	3	$160.00
November, 1978	92	160.00
November, 1979	50	165.00
March, 1980	45	165.00
December, 1980	80	160.00
March, 1981	110	160.00

(1) Per letter dated December 21, 1982, from Mr. K. A. Skopec, President, The Mid-City National Bank of Chicago

(2) 50,000 shares outstanding

Table IV

Report of Income Summary, The Mid-City National Bank of Chicago

	1977	1978	1979	1980	1981
	(year end data in $M)				
Interest Income	10,522	12,328	14,718	17,459	22,495
Interest Expense	4,716	6,017	8,554	10,681	15,695
Net Interest Income	5,806	6,311	6,164	6,778	6,800
Non-Interest Income	521	484	455	530	677
Non-Interest Expenses:					
Overhead	3,536	3,853	4,021	4,641	5,121
Provision for Loan Losses	-3	-22	-9	0	-6
Income Before Taxes	2,794	2,964	2,607	2,667	2,362
Income Taxes	478	488	157	145	63
Income Before Securities Transactions	2,316	2,476	2,450	2,522	2,299
Securities Gains (Losses) Net of Taxes	7	-77	-26	5	-43
Extraordinary Gains (Losses)	—	—	—	—	—
Net Income	2,323	2,399	2,424	2,527	2,256
Earnings Per Share (based upon 50,000 shares outstanding)	$ 46.46	$ 47.98	$ 48.48	$ 50.54	$ 45.12

TABLE V

Loan Loss Data ($M)

	1977	1978	1979	1980	1981
Actual Net Loan Loss (Recovery)	(3)	(22)	(9)	0	(6)
Provision for Loan Losses	(3)	(22)	(9)	0	(6)
Reserve for Possible Loan Losses	2,407	2,407	2,407	2,407	2,407
RPLL/Total Loans	4.06	3.72	3.79	4.02	3.47

TABLE VI

1981 Year-End Price/Earnings Ratios (x)

Bank Name	P/E Ratio
Albany Bank & Trusty Co., National Association	6.26
Marquette National Bank	3.78
Merchandise National Bank	23.73
Uptown National Bank of Chicago	7.92
Average	10.42
Average without Merchandise National Bank	5.99 or 6X

APPENDIX F

United States Statutes

5 U.S.C. §701-706 (1982)

12 U.S.C. §215a (1982)

28 U.S.C. §1291 (1982)

28 U.S.C. §1254 (1) (1982)

U.S. CONSTITUTION, AMENDMENT V

§701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392.

§702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392; Pub.L. 94-574, § 1, Oct. 21, 1976, 90 Stat. 27[illegible].

§703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is pro-

vided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392; Pub.L. 94-574, § 1, Oct. 21, 1976, 90 Stat. 2721.

§704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392.

§706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed: and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

§215a. Merger of national banks or State banks into national banks.

(a) Approval of Comptroller, board and shareholders; merger agreement; notice; capital stock; liability of receiving association

One or more national banking associations or one or more State banks, with the approval of the Comptroller, under an agreement not inconsistent with this subchapter, may merge into a national banking association located within the same State, under the charter of the receiving association. The merger agreement shall—

(1) be agreed upon in writing by a majority of the board of directors of each association or State bank participating in the plan of merger;

(2) be ratified and confirmed by the affirmative vote of the shareholders of each such association or State bank owning at least two-thirds of its capital stock outstanding, or by a greater proportion of such capital stock in the case of a State bank if the laws of the State where it is organized so require, at a meeting to be held on the call of the directors, after publishing notice of the time, place, and object of the meeting for four consecutive weeks in a newspa-

per of general circulation published in the place where the association or State bank is located, or, if there is no such newspaper, then in the newspaper of general circulation published nearest thereto, and after sending such notice to each shareholder of record by certified or registered mail at least ten days prior to the meeting, except to those shareholders who specifically waive notice, but any additional notice shall be given to the shareholders of such State bank which may be required by the laws of the State where it is organized. Publication of notice may be waived, in cases where the Comptroller determines that an emergency exists justifying such waiver, by unanimous action of the shareholders of the association or State bank;

(3) specify the amount of the capital stock of the receiving association, which shall not be less than that required under existing law for the organization of a national bank in the place in which it is located and which will be outstanding upon completion of the merger, the amount of stock (if any) to be allocated, and cash (if any) to be paid, to the shareholders of the association or State bank being merged into the receiving association; and

(4) provide that the receiving association shall be liable for all liabilities of the association or State bank being merged into the receiving association.

(b) Dissenting shareholders

If a merger shall be voted for at the called meetings by the necessary majorities of the shareholders of each association or State bank participating in the plan of merger, and thereafter the merger shall be approved by the Comptroller, any shareholder of any association or State bank to be merged into the receiving association who has voted against such merger at the meeting of the association or bank of which he is a stockholder, or has given notice in writing at or prior to

such meeting to the presiding officer that he dissents from the plan of merger, shall be entitled to receive the value of the shares so held by him when such merger shall be approved by the Comptroller upon written request made to the receiving association at any time before thirty days after the date of consummation of the merger, accompanied by the surrender of his stock certificates.

(c) Valuation of shares

The value of the shares of any dissenting shareholder shall be ascertained, as of the effective date of the merger, by an appraisal made by a committee of three persons, composed of (1) one selected by the vote of the holders of the majority of the stock, the owners of which are entitled to payment in cash; (2) one selected by the directors of the receiving association; and (3) one selected by the two so selected. The valuation agreed upon by any two of the three appraisers shall govern. If the value so fixed shall not be satisfactory to any dissenting shareholder who has requested payment, that shareholder may, within five days after being notified of the appraised value of his shares, appeal to the Comptroller, who shall cause a reappraisal to be made which shall be final and binding as to the value of the shares of the appellant.

(d) Application to shareholders of merging associations: Appraisal by Comptroller; expenses of receiving association; sale and resale of shares; State appraisal and merger law

If, within ninety days from the date of consummation of the merger, for any reason one or more of the appraisers is not selected as herein provided, or the appraisers fail to determine the value of such shares, the Comptroller shall upon written request of any interested party cause an appraisal to be made which shall be final and binding on all parties. The expenses of the Comptroller in making the reappraisal or the appraisal, as the case may be, shall be paid by the receiving association. The value of the shares ascertained shall be promptly paid to the dissenting shareholders by the receiving

association. The shares of stock of the receiving association which would have been delivered to such dissenting shareholders had they not requested payment shall be sold by the receiving association at an advertised public auction, and the receiving association shall have the right to purchase any of such shares at such public auction, if it is the highest bidder therefor, for the purpose of reselling such shares within thirty days thereafter to such person or persons and at such price not less than par as its board of directors by resolution may determine. If the shares are sold at public auction at a price greater than the amount paid to the dissenting shareholders, the excess in such sale price shall be paid to such dissenting shareholders. The appraisal of such shares of stock in any State bank shall be determined in the manner prescribed by the law of the State in such cases, rather than as provided in this section, if such provision is made in the State law; and no such merger shall be in contravention of the law of the State under which such bank is incorporated. The provisions of this subsection shall apply only to shareholders of (and stock owned by them in) a bank or association being merged into the receiving association.

(e) Status of receiving association: property rights and interests vested and held as ficuciary

The corporate existence of each of the merging banks or banking associations participating in such merger shall be merged into and continued in the receiving association and such receiving association shall be deemed to be the same corporation as each bank or banking association participating in the merger. All rights, franchises, and interests of the individual merging banks or banking associations in and to every type of property (real, personal, and mixed) and choses in action shall be transferred to and vested in the receiving association by virtue of such merger without any deed or other transfer. The receiving association, upon the merger and without any order or other action on the part of any court or otherwise, shall hold and enjoy all rights of property, franchises, and interests, including appointments, designa-

tions, and nominations, and all other rights and interests as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, and committee of estates of lunatics, and in every other fiduciary capacity, in the same manner and to the same extent as such rights, franchises, and interests were held or enjoyed by any one of the merging banks or banking associations at the time of the merger, subject to the conditions hereinafter provided.

(f) Removal as fiduciary: discrimination

Where any merging bank or banking association, at the time of the merger, was acting under appointment of any court as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates assignee, receiver, or committee of estates of lunatics, or in any other fiduciary capacity, the receiving association shall be subject to removal by a court of competent jurisdiction in the same manner and to the same extent as was such merging bank or banking association prior to the merger. Nothing contained in this section shall be considered to impair in any manner the right of any court to remove the receiving association and to appoint in lieu thereof a substitute trustee, executor, or other fiduciary, except that such right shall not be exercised in such a manner as to discriminate against national banking associations, nor shall any receiving association be removed solely because of the fact that it is a national banking association.

(g) Issuance of stock by receiving association: preemptive rights

Stock of the receiving association may be issued as provided by the terms of the merger agreement, free from any preemptive rights of the shareholders of the respective merging banks.

(Nov. 7, 1918, c. 209, & 2, as added Sept. 8, 1959, Pub.L. 86-230, §20. 73 Stat. 463.)

§1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

§1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX G

Other Authorities

U.S. HOUSE OF REPRESENTATIVES REPORT NO. 408
MARCH 25, 1918

U.S. SENATE REPORT NO. 406
APRIL 24, 1918

65th CONGRESS HOUSE OF REPRESENTATIVES. REPORT
2d Session, No. 408.

CONSOLIDATION OF NATIONAL BANKING ASSOCIATIONS.

MARCH 25, 1918—Referred to the House Calendar and order to be printed.

Mr. WINGO, from the Committee on Banking and Currency, submitted the following

REPORT.

[To accompany if, R. 10205.]

The Committee on Banking and Currency, to which was referred the bill (H. R. 10205) to provide for the consolidation of national banking associations, having had the same under consideration, report it back to the House with sundry amendments, and recommend that the amendments be agreed to, and the bill as amended do pass.

The amendments recommended by the committee are as follows:

Page 1, line G, after the word "association," insert the following: "Under the charter of either existing banks,"

Page 2, line 9, after the word "consolidated," insert the following: "who has not voted for such consolidation,"

Page 3, line 9, after the word "consolidated," insert the following:

> And all the rights, franchises and interests of the said national bank so consolidated in and to every species of property, personal and mixed, and change in action thereto belonging, shall be deemed to be transferred to and vested in such national bank into which it is consolidated without any deed or other transfer, and the said consolidated national

bank shall hold and enjoy the same and all rights of property, from historical interest in the same manner and to the same extent as was held and enjoyed by the national bank so consolidated therewith.

The purpose of the bill.—This bill has but one object, and that is to simplify the consolidation of existing national banks in any county, city, town or village, where two or more national banks desire to consolidate. Under existing law if such consolidation is desired, it is necessary for one of the banks to surrender its charter, and go through the process of liquidation. It is the purpose of this bill to remove the necessity of liquidation and permit the consolidation to take place upon the affirmative vote of the stockholders of each association, such consolidation being permitted under the charter of either of the existing banks. Proper provision is made by the proposed law to protect any dissenting stockholder in either corporation, who does not desire to be connected with the consolidated bank. The necessity for the amendments proposed by the committee are obvious and need no explanation.

Calendar No. 367.

65th CONGRESS *2d Session,* SENATE. REPORT No. 406.

CONSOLIDATION OF NATIONAL BANKING ASSOCIATIONS.

APRIL 24, 1918.—Ordered to be printed.

Mr. OWEN, from the Committee on Banking and Currency, submitted the following

REPORT

[To accompany S. 3907.]

The Committee on Banking and Currency favorably reports S. 3907, a bill to provide for the consolidation of national banking associations. This bill permits two or more national banking associations located within the same county, city, town, or village with the approval of the Comptroller of the Currency to consolidate, upon due notice and upon the approval of two-thirds of the stockholders of the association, and provides a means of paying in full any dissatisfied stockholder by arbitration.

This bill is recommended by the Comptroller of the Currency and has the obvious advantage of permitting the consolidation without compelling one bank to be absorbed by another.

(2)

No. 85-713

Supreme Court, U.S.
FILED
NOV 26 1985
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

GUSTAV E. BEERLY, TRUSTEE OF THE GUSTAV E. BEERLY TRUST,

Petitioner,

vs.

DEPARTMENT OF THE TREASURY, DONALD REGAN, SECRETARY; COMPTROLLER OF THE CURRENCY; THE MID-CITY NATIONAL BANK OF CHICAGO; AND MID-CITCO INCORPORATED,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BANK RESPONDENTS' BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

GUSTAV E. BEERLY, TRUSTEE OF THE
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Petitioner,

vs.

DEPARTMENT OF THE TREASURY, DONALD REGAN,
SECRETARY; COMPTROLLER OF THE CURRENCY;
THE MID-CITY NATIONAL BANK OF CHICAGO;
AND MID-CITCO INCORPORATED,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT[1]

BANK RESPONDENTS' BRIEF IN OPPOSITION[2]

Respondents The Mid-City National Bank of Chicago and Mid-Citco Incorporated respectfully show that this case is unworthy of certiorari:

[1] The Seventh Circuit's opinion in this case is reported at 768 F.2d 942.

[2] Statement under Rule 28.1: Mid-Citco Incorporated is a Delaware corporation which, except for wholly-owned subsidiaries, has no subsidiary or affiliate. Mid-Citco has no parent. The Mid-City National Bank of Chicago is a chartered national bank which has no subsidiary or affiliate. Its parent is Mid-Citco Incorporated.

SUMMARY OF ARGUMENT

In this action to review the propriety of the Comptroller of the Currency's appraisal of petitioner's bank stock, both the district court and the court of appeals held that the agency decision was not arbitrary or capricious, that it was reasonable, and that the Comptroller gave petitioner due process. That issue has been decided twice in favor of the respondents and does not merit further review by this court. *Mobil Oil Corp. v. F.P.C.*, 417 U.S. 283, 310 (1974).

The petition does not raise any of the issues which establish normal grounds for review here. Two of the issues ("liquidation value" and interest) were not raised or decided below, and should not have been presented to this Court. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147, n. 2 (1970).

Another issue (discrimination against minority shareholders) flies in the face of hornbook law, 12B *Fletcher Cyclopedia Corporations* § 5805 (perm. ed. 1984), and was correctly decided by the court of appeals.

The last issue (lack of evidentiary hearing) is controlled by *Mathews v. Eldridge*, 424 U.S. 319, 325, 344-45 (1976), which held that where, as here, there are no issues of credibility, procedural due process does not require an evidentiary hearing or even a limited oral prensentation.

Finally, the fact there is only one other reported case during the past 67 years in which an appraisal under the Bank Merger Act has been challenged (*Simonds v. Guaranty Bank & Trust Co.*, 492 F.Supp. 1079 (D. Mass. 1979)) shows that the statute is understood and is working well—the law is not in disarray. There is no need for clarification by this Court.

REASONS FOR DENYING THE WRIT

I.

THE PETITION FAILS TO MEET THE PREREQUISITES FOR A WRIT OF CERTIORARI.

Both the Seventh Circuit and the district court carefully considered the extensive administrative record and the Comptroller's written decision. Both courts concluded that the Comptroller's decision was not arbitrary or capricious, that the appraisal was based on a consideration of the relevant factors and was reasonable.

The petition does not contend that the decision below conflicts with a decision of this Court, another circuit, another panel of the Seventh Circuit, or the highest court of a state. It does not contend the court of appeals so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the district court or Comptroller, as to call for an exercise of this Court's power of supervision. This is not truly a case of "first impression" as asserted by petitioner. It was established by *Simonds v. Guaranty Bank & Trust Co.*, 492 F. Supp. 1079 (D. Mass. 1979), that the Comptroller has the power to value dissenting shares in bank mergers but must do so in a reasonable way rather than by an arbitrary formula. All that the instant case adds is that the Comptroller need not hold a formal hearing but may act upon written submissions supplied by the interested parties.

The only issue really sought to be raised is a factual one—whether petitioner's stock is worth more than the appraised value established by the Comptroller. This Court will decide such an issue only in the rare instance where the "substantial evidence" standard of administrative review has been misapprehended or grossly misapplied. *Mobil Oil Corp. v. F.P.C.*,

417 U.S. 283, 310 (1974); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951). That is not the case here.

II.

THE COURTS BELOW CORRECTLY CONCLUDED THAT THE COMPTROLLER MADE A FAIR, ACCURATE APPRAISAL OF PETITIONER'S STOCK AND THAT, IN SO DOING, THE COMPTROLLER VIOLATED NONE OF PETITIONER'S STATUTORY OR CONSTITUTIONAL RIGHTS.

A. The Court Of Appeals Correctly Held That Petitioner Was Awarded The Full Value Of His Bank Stock And That There Was No Unlawful Discrimination Against Petitioner.

Petitioner contends the Comptroller and both courts erred by finding that his shares were worth less per share than those of a controlling block of stock. (Pet. 4, 6-7.) Such contention flies in the face of hornbook law and common sense. As indicated by the lucid opinion of the court of appeals, it is axiomatic that a majority or controlling interest is more valuable than a minority interest. (App. A-9.) Federal law contains no requirement that all shareholders receive the same price for their shares. (App. A-9.) It is also established as a matter of general corporate law that a dominant or majority shareholder is under no duty to refrain from receiving a premium upon the sale of his controlling stock. *See* 12B *Fletcher Cyclopedia Corporations* § 5805 (perm. ed. 1984).

B. Petitioner's Contention That He Is Entitled To Receive The Liquidation Value Of His Bank Stock Was Not Raised In The Courts Below; And, In Any Case, Such Contention Is Wrong As A Matter Of Law.

Petitioner contends that, "Liquidation value is the only proper method of valuating bank stock in a merger situation." (Pet. 8.) This issue was not raised in either of the courts below,

and is not open for review here. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147, n. 2 (1970). *See also NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 163-64 (1975); *Ramsey v. United Mine Workers*, 401 U.S. 302, 312 (1971).

Furthermore, petitioner's contention is wrong as a matter of law. Upon consolidation or merger of a corporation, appraisal of dissenters' stock must be upon a going concern basis, not a liquidation basis. *Ahlenius v. Brenn & Humphreys, Inc.*, 358 Ill. 155, 168-69 192 N.E. 824, 829-30 (1934); *Chicago Corporation v. Munds*, 20 Del. Ch. 142, 172 A. 452, 455 (1934); Note, *Valuation of Dissenters' Stock Under Appraisal Statutes*, 79 Harv. L. Rev. 1453, 1457 (1966) ("There is nearly complete agreement that book value does not accurately represent the fair value of corporate assets .... In most cases liquidation value of the assets is not an appropriate consideration.... Most courts generally prefer to look to the going concern value.")

The bank here (Mid-City) was not liquidated, sold to or merged with a third party. It was simply reorganized as the subsidiary of a bank holding company (Mid-Citco) created by the bank's management. Petitioner had the opportunity to exchange his shares in Mid-City for an equal number of shares in Mid-Citco.[3]

---

[3] Petitioner's reliance upon *Voeller v. Neilston Warehouse Co.*, 311 U.S. 531 (1941) is misplaced because the corporation in that case was in liquidation, there was no appraisal of the dissenters' shares, and a state statute with peculiar appraisal prerequisites was at issue. None of these factors exist in the present case. *Lebold v. Inland Steel Co.*, 125 F.2d 369 (7th Cir. 1941) likewise does not apply because there, the majority shareholder fraudulently squeezed out the dissenters. *American General Corporation v. Camp*, 171 Md. 629, 190 A. 225 (1937) does not support petitioner's theory that liquidation value is the only proper method of appraising bank stock in a merger situation. The court held that "fair value" is the proper standard and

(Footnote continued on following page.)

The Comptroller considered and weighed the four classic factors for appraising petitioner's stock (book value, adjusted book value, market value and investment value) and appraised it at $282.39 per share. (App. E-3—E-8.) If there was any error, it favored petitioner because the Comptroller assigned zero weight to the market value of petitioner's stock which, at the time, was only $160.00 per share. (App. E-7.)

C. Because He Raised The Interest-Constitutionality Issue For The First Time In His Appellate Reply Brief, And Because The Court Of Appeals Properly Refused To Decide It, Petitioner Cannot Now Challenge The Constitutionality Of The Bank Merger Act.

Petitioner raised the interest-constitutionality issue (Pet. 9-10) for the first time in his appellate reply brief in violation of Seventh Circuit Rule 9(e) ("A reply brief shall be limited to matter in reply."). Therefore, the court of appeals refused to consider the matter. (App. A-13—A-14.) Although petitioner made passing reference in his complaint to nonpayment of dividends and interest, it was not part of the prayer for relief. Nor was it raised in his cross-motion for summary judgment. Therefore, the issue is not open here. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 163-64 (1975); *Ramsey v. United Mine Workers*, 401 U.S. 302, 312 (1971).

(Footnote continued from preceding page.)

that, in addition to net asset value, such factors as market value and capitalization of estimated future income should be considered. 190 A. at 229. Finally, *F.W. Woodward v. Quigley*, 257 Ia. 1077, 133 N.W. 2d 38 (1965), *modified*, 257 Ia. 1077, 136 N.W. 2d 280 (1965), is inapposite because the corporation would have been liquidated but for the majority shareholders' decision to extend its existence perpetually.

D. The Court Of Appeals Was Correct When It Held That Both The Text Of The Bank Merger Act And Its Application In This Case Comport With The Due Process Clause Of The Fifth Amendment.

Petitioner challenges the constitutionality of 12 U.S.C. § 215a on the ground it fails to specify an evidentiary hearing before the Comptroller. (Pet. 10-13.) The court of appeals correctly rejected this contention, stating, "The only thing missing" from the hearing before the Comptroller "was oral testimony and the opportunity for cross-examination." (App. A-13.) As the district court observed, "No questions of credibility were involved." (App. D-10.) Thus, the appraisal procedure met constitutional muster under *Mathews v. Eldridge*, 424 U.S. 319, 325, 344-45 (1976) (neither an evidentiary hearing nor even a limited oral presentation is required when there are no issues of credibility).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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Counsel for Respondents
The Mid-City National
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Mid-Citco Incorporated.

DATED: November 26, 1985.

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court and that pursuant to Rules 28.3 and 28.5 (b) of the Rules of the Supreme Court, I this day served three (3) copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit upon counsel for the respondents, required to be served. Such service was accomplished by mailing the copies first-class and postage prepaid to counsel at the following addresses:

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(3)

No. 85-713

Supreme Court, U.S.
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JAN 24 1986
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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

GUSTAV E. BEERLY, TRUSTEE, ETC., PETITIONER

v.

DEPARTMENT OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

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DEPARTMENT OF THE TREASURY, ET AL.

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MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Petitioner, a dissenting shareholder in a bank merger, challenges the appraisal of his shares made by the Comptroller of the Currency pursuant to 12 U.S.C. 215a.

1. Petitioner, as trustee, held approximately three percent of the stock of Mid-City National Bank of Chicago (the bank) (Pet. 3 n.1). In 1982, the bank was merged into Mid-City Bank, N.A., which immediately became a subsidiary of a newly-formed bank holding company (Pet. App. A4, D3). The initial merger required and obtained the approval of the Comptroller of the Currency under 12 U.S.C. 215a (Pet. App. A4). This statute also provides that a shareholder dissenting from the merger may receive the "value" of his shares (12 U.S.C. 215a(b)); petitioner, who did dissent, accordingly availed himself of this mechanism. "Value" is determined by a committee of three appraisers, one of whom is chosen by the receiving bank, one by the

dissenters, and the third by the first two appraisers (Section 215a(c)). Where, as here, the first two appraisers are unable to agree upon a third or are otherwise unable to agree upon a valuation, the statute provides for a binding appraisal by the Comptroller (Section 215a(d)). Petitioner invoked this provision, requesting such an appraisal (Pet. App. A4).

The receiving bank and the dissenting shareholders made written submissions to the Comptroller, supporting their differing valuations of the stock (Pet. App. A4). After reviewing those submissions, and considering several alternative methods of stock valuation, the Comptroller issued his appraisal, valuing the stock at $282.39 per share (*id.* at E1-E11). Petitioner, dissatisfied with the appraisal, brought an action under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, for review of the Comptroller's action, claiming inter alia that the appraisal was arbitrary and capricious and that it deprived him of property without due process (Pet. App. D2). The district court granted the Comptroller's motion for summary judgment, finding his decision reasonable and the procedures used appropriate (*id.* at D1-D11). The Seventh Circuit unanimously affirmed (*id.* at A1-A14).

2. Petitioner has presented no reason why this factbound case warrants review by this Court. Petitioner himself points out that this case is "one of first impression" in the courts of appeals (Pet. 5), and he does not claim any inconsistency between the court of appeals' holding here and that of the only other reported case challenging a similar appraisal, *Simonds* v. *Guaranty Bank & Trust Co.*, 492 F. Supp. 1079 (D. Mass. 1979) (involving the "essentially analogous" 12 U.S.C. 214a (492 F. Supp. at 1082)). The paucity of litigation in this area (see Pet. App. A3-A4) itself argues against this Court's granting review.

The decision below is, in any event, correct.

a. Petitioner's principal contention is that the Comptroller chose the wrong method of valuing his stock, and that calculating a pro rata share of the bank's liquidated value is the only proper method (Pet. 6-9). There is no support for this proposition, however, in either the statute or its legislative history. The statute merely states that a dissenting shareholder is "entitled to receive the value of the share so held by him," and that the Comptroller shall, in cases such as this, "cause an appraisal to be made which shall be final and binding on all parties" (12 U.S.C. 215a(b), 215a(d)). The legislative history in no way narrows this broad mandate or gives dissenting shareholders the right to any particular valuation method. On the contrary, it states that the statute "has but one object, and that is to simplify the consolidation of existing national banks * * *" (H.R. Rep. 408, 65th Cong., 2d Sess. 1 (1918) (set out at Pet. App. G3)). And, of course, the agency's interpretation of its own statute merits deference. See *Martin* v. *Kilgore First Bancorp, Inc.*, 747 F.2d 1024, 1027 (5th Cir. 1984), cert. denied, No. 84-1582 (May 28, 1985).

Thus, the task of the Comptroller is to ascertain, using the method he deems most appropriate under the particular circumstances of each case, the value of the dissenters' shares. As the court of appeals recognized (Pet. App. A6), review of this essentially factual determination is necessarily deferential, and the Comptroller's decision must be upheld unless it was "arbitrary, capricious, [or] an abuse of discretion" (5 U.S.C. 706(2)(A); see *Camp* v. *Pitts*, 411 U.S. 138, 141-142 (1973)). Petitioner does not challenge this standard.

As the court of appeals then explained at length (Pet. App. A6-A12), the Comptroller's determination—which even petitioner seems to admit reflected "conventional

approaches to valuation" (Pet. 8)—plainly passes muster under this standard. Petitioner's repeated protests that the Comptroller's method of valuation "disadvantages dissenters" and "victimiz[es] * * * the minority" (Pet. 5, 8) are baseless. Petitioner could have received exactly what the majority shareholders received—shares in the new bank—but chose instead to take the cash value of those shares under the statutory appraisal provisions. The relief petitioner seeks—a pro rata share of a speculative liquidation value of the bank—has not been available to any other shareholder. He presents no cogent reason why a Congress that sought to facilitate bank mergers would provide such uniquely favorable treatment for dissenting shareholders, or why it would award minority shareholders a premium for something (*i.e.*, control of the corporation) they by definition do not have (see, *e.g.*, Pet. 7). There is, in any event, certainly no reason to suppose that petitioner's particular method of valuation was mandated by Congress.

b. The court of appeals also properly disregarded petitioner's contentions (Pet. 9-10) regarding the payment of interest during the period of appraisal and judicial review. Petitioner raised this issue for the first time in his reply brief and, regardless of the merits of the issue, the Seventh Circuit has duly adopted a rule specifically providing that "[a] reply brief shall be limited to matter in reply" (7th Cir. R. 9(e); see *Christmas* v. *Sanders*, 759 F.2d 1284, 1292 (7th Cir. 1985)). Petitioner does not deny that he failed to make any mention of this issue in his principal brief below.[1] There is no violation of due process when a federal court merely

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[1]Petitioner claims (Pet. 12-13) that he raised the issue in the district court, but this is irrelevant if he did not raise it on appeal. Moreover, it is doubtful that the issue was pursued even in the district court (see Bank Respondents' Brief in Opposition 6), which did not mention it in its opinion.

enforces its own—entirely reasonable and necessary—procedural rules, even when such enforcement precludes issues that might otherwise have been raised. See *Thomas* v. *Arn*, No. 84-5630 (Dec. 4, 1985).

In any event, there is no merit to petitioner's claim that Congress, in enacting Section 215a without provision for interest during the appraisal and judicial review period, effected an unconstitutional taking of property. Petitioner cites no authority for his constitutional argument, and says only that "[o]ther appraisal statutes" have taken a different approach (Pet. 10). But there is nothing unusual, much less unconstitutional, about a legal rule that declines to provide litigants with interest for the time prior to final administrative or judicial resolution of an issue. See, *e.g.*, *Banks* v. *Pan American World Airways, Inc.*, 763 F.2d 1399, 1401 (11th Cir. 1985) (upholding decision of CAB not to award prejudgment interest to furloughed airline employees); *In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979*, 644 F.2d 633, 637-638 (7th Cir. 1981) (federal court must, in diversity case, follow state rule regarding prejudgment interest). Nor, similarly, is there a constitutional requirement that, if Congress provides for prejudgment interest under one statute, it must provide for it under all.

c. Finally, there is no constitutional requirement here for an evidentiary hearing (see Pet. 10-13). Even concluding, as the court of appeals did (Pet. App. A12), that the "forced exchange" at issue here would constitute an unconstitutional deprivation unless accompanied by due process, the Comptroller's procedures plainly provided "the process that is due in these circumstances." *Greenholtz* v. *Inmates of the Nebraska Penal & Correctional Complex*, 442 U.S. 1, 12 (1979); see *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). As the court of appeals pointed out (Pet. App. A12-A13), the valuation of stock has traditionally been carried out without oral hearings, since it generally involves no questions

(such as, for instance, witness credibility) that would make such a hearing necessary. Petitioner here, indeed, does not challenge the specific factual premises of the Comptroller's valuation, but rather the methods he used in reaching the ultimate result; thus, it is not clear what petitioner contends he was denied the opportunity to present. The procedures used by the Comptroller, under which he weighed petitioner's written submissions along with other available evidence and issued a written appraisal specifying how he reached his decision, afforded petitioner ample process and opportunity to be heard. Under comparable circumstances, numerous courts have recognized that an oral hearing is not a constitutional requirement.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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[2]See *Gray Panthers* v. *Schweiker*, 716 F.2d 23, 35-36 (D.C. Cir. 1983) (no need for oral hearings for determinations regarding Medicare benefits in the absence of issues of veracity or credibility); *C&H Transportation Co.* v. *ICC*, 704 F.2d 834, 848 (5th Cir. 1983) (ICC certification); *Erco Industries Ltd.* v. *Seaboard Coast Line R.R.*, 644 F.2d 424, 431-432 (5th Cir. 1981) (grant of summary judgment without oral argument); *Basciano* v. *Herkimer*, 605 F.2d 605, 610-611 (2d Cir. 1978), cert. denied, 442 U.S. 929 (1979) (disability determinations involving medical evidence); see generally Friendly, "*Some Kind of Hearing*," 123 U. Pa. L. Rev. 1267, 1281 (1975).